No. 06-73217

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

EPA'S PETITION FOR REHEARING, WITH A SUGGESTION FOR REHEARING *EN BANC*

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INTRODUCTION

Respondent United States Environmental Protection Agency ("EPA") seeks panel rehearing or rehearing *en banc* of the Panel's ruling in Natural Resources Defense Council v. EPA, 526 F.3d 591 (9th Cir. 2008).[1] *En banc* review is merited under Rule 35 because the decision is directly contrary to Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984), and its progeny, including National Cable and Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005), Smiley v. Citibank, 517 U.S. 735 (1996), Rust v. Sullivan, 500 U.S. 173 (1991), and this Court's decision in Resident Councils of Washington v. Leavitt, 500 F.3d 1025 (9th Cir. 2007). The Panel majority erred by overturning EPA's final rule *solely because* the Panel found it inconsistent with EPA's prior interpretation of a provision of the Clean Water Act ("CWA") that even the Panel majority conceded is ambiguous. As the dissent notes, the Panel did so notwithstanding EPA's reasonable explanation that it promulgated the challenged rule specifically to effectuate Congress' intent in amending the pertinent provisions of the CWA through the Energy Policy Act of 2005. The Panel majority's refusal to afford *any* deference to EPA's interpretation under these circumstances is completely at odds with the Supreme Court's command in Brand X and this Court's own

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[1] A copy of the decision is attached.

precedent that "an agency's 'new' position is entitled to deference 'so long as the agency acknowledges and explains the departure from its prior views.'" Resident Councils of Washington, 500 F.3d at 1036. The Panel's decision is particularly problematic because it imposes on EPA the Panel's own construction of the ambiguous statutory provision and effectively precludes EPA from implementing Congress' intent in amending the CWA. Cf. The Lands Council v. McNair, _ F.3d _, No. 07-35000, 2008 WL 2640001, at * 9 (9th Cir. July 2, 2008) (*en banc*) ("Were we to grant less deference to the agency, we would be ignoring the APA's arbitrary and capricious standard of review"). The Court should therefore vacate the Panel's decision and rehear this matter under the correct, deferential standard of review.

BACKGROUND

I. Statutory Background

The CWA, 33 U.S.C. §§ 1251-1387, is designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). The CWA prohibits the "discharge of any pollutant" except in compliance with the CWA's provisions. 33 U.S.C. § 1311(a). Discharges can be authorized by a National Pollutant Discharge Elimination System ("NPDES") permit under CWA section 402. 33 U.S.C. § 1342(a).

Congress amended the CWA in the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987), adding new section 402(p), 33 U.S.C. § 1342(p), which required NPDES permits for some, but not all, storm water discharges. At the same time, Congress enacted section 402(*l*), which explicitly exempted certain storm water sources from NPDES permitting. 33 U.S.C. § 1342(*l*). As discussed below, in the Energy Policy Act of 2005, Congress effectively amended CWA section 402(*l*)(2), respecting storm water discharges from oil and gas operations, by adding a new definition of a key term in that provision to make it clear that oil and gas construction storm water discharges were eligible for the CWA section 402(*l*)(2) exemption.

II. Regulatory History

A. Storm Water Discharges at Oil and Gas Sites Prior to the Energy Policy Act

Section 402(p) established two phases for the regulation of storm water discharges. 33 U.S.C. § 1342(p). Under its Phase I Rule, EPA established a permit program for certain discharges, including, among others, storm water discharges from construction sites that disturb at least five acres of land ("Large Construction" sites). 33 U.S.C. § 1342(p)(2)-(4); 40 C.F.R. §122.26(b)(14)(x); 55 Fed. Reg. 47,990 (Nov. 16, 1990). See NRDC v. EPA, 966 F.2d 1292 (9th Cir.

1992) (reviewing challenged portions of the Phase I Rule).

Under its Phase II Rule, EPA identified certain additional sources of storm water discharges for regulation, including, among others, construction sites that disturb one to five acres of land ("Small Construction" sites). 33 U.S.C. § 1342(p)(5),(6); 40 C.F.R. §122.26(b)(15); 64 Fed. Reg. 68,722 (Dec. 8, 1999). See Envtl. Defense Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003) (reviewing the Phase II Rule).

Under the Phase I Rule, discharges from Large Construction sites have been subject to permitting requirements since October 1, 1992. See 40 C.F.R. § 122.26(e)(1)(i). The Phase II rule established a March 10, 2003, deadline for permit applications for Small Construction sites. 64 Fed. Reg. at 68,840 (codified at 40 C.F.R. § 122.26(e)(8)).

Congress also included in the 1987 amendments an express permit *exemption* for certain storm water discharges from oil, gas and mining *operations*. Section 402(*l*)(2) provides that:

> The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches and channels)

> used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

33 U.S.C. § 1342(*l*)(2). EPA implemented the section 402(*l*)(2) exemption in the Phase I Rule by exempting storm water discharges from covered oil and gas operations unless the discharge contained a reportable quantity of oil or hazardous substances under the CWA or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, or otherwise contributed to the violation of a water quality standard. 40 C.F.R. § 122.26(c)(1)(iii); see NRDC v. EPA, 966 F.2d at 1306-09 (upholding EPA's regulations with respect to the CWA section 402(*l*)(2) oil and gas exemption). At that time, EPA asserted that Large Construction activities at oil and gas sites were *not* eligible for the section 402(*l*)(2) exemption, which it interpreted to apply only to oil and gas exploration, production, processing or treatment operations or transmission facilities, and not to activities necessary to construct such operations. See Appalachian Energy Group v. EPA, 33 F.3d 319 (4th Cir. 1994) (dismissing for lack of subject matter jurisdiction a challenge to an internal EPA memorandum expressing this interpretation). See also 71 Fed. Reg. 33,628, 33,629 (June 12, 2006).

While EPA did not interpret the CWA section 402(*l*)(2) exemption to apply to discharges from oil and gas construction activities, EPA also initially believed that few, if any, oil or gas construction activities actually disturb more than one acre of land, and therefore that few would be regulated. After promulgating its Phase II regulations, however, EPA determined that close to 30,000 new oil and gas sites annually may be affected by the regulations when the acreage disturbed is considered in the aggregate (e.g., access roads, pipelines, and well pads). 67 Fed. Reg. 79,828, 79,829 (Dec. 30, 2002). See also 71 Fed. Reg. at 33,629.

In order to consider this new information, EPA initially postponed until March 10, 2005, the NPDES permit application deadline for storm water discharges from Small Construction activity associated with oil and gas sites. Id.; 68 Fed. Reg. 11,325 (Mar. 10, 2003) ("the Deferral Rule"). See Texas Indep. Producers and Royalty Owners Ass'n v. EPA, 413 F.3d 479, 483 (5th Cir. 2005) (dismissing challenge to the Deferral Rule on ripeness grounds). In part, EPA did so in order to further evaluate the economic impact of the permit requirements on the oil and gas industry and the scope and effect of the CWA section 402(*l*)(2) exemption. 68 Fed. Reg. at 11,326. See 71 Fed. Reg. at 33,629-30.

EPA further deferred this deadline until June 12, 2006, after its preliminary analysis indicated that there could be substantial economic impacts associated with the regulation of oil and gas sites that it had not yet taken into account. 71 Fed. Reg. at 33,630; 70 Fed. Reg. 11,560 (Mar. 9, 2005).

B. <u>The Energy Policy Act of 2005</u>

Before EPA could finish its evaluation under the Deferral Rule, Congress passed the Energy Policy Act of 2005, which the President signed into law on August 8, 2005. Section 323 of the Energy Policy Act provides:

> Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended by adding at the end the following:
>
> (24) OIL AND GAS EXPLORATION AND PRODUCTION. – The term 'oil and gas exploration, production, processing, or treatment operations or transmission facilities' means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, *whether or not such field activities or operations may be considered to be construction activities.*

H.R. 6, 109th Cong., 1st Sess. § 323 (2005) (emphasis added). Thus, the Energy Policy Act amended the CWA by defining "oil and gas exploration, production, processing, or treatment operations, or transmission facilities" to specifically include related construction activities, thereby bringing such activities within the CWA section 402(*l*)(2) exemption from the NPDES permit requirement. 33

U.S.C. § 1362(24).[2]

C. EPA's Final Rule

In the rule challenged here, EPA implemented this CWA amendment by exempting from NPDES permit requirements oil and gas construction site storm water discharges that contain only sediment. 71 Fed. Reg. at 33,630-31; 40 C.F.R. § 122.26(a)(2)(ii). EPA explained in its preamble to the final rule that, under CWA section 402(*l*)(2), storm water discharges from oil and gas sites are exempt unless the discharges become contaminated through contact with the materials specified in section 402(*l*)(2): "raw material, intermediate products, finished product, byproduct, or waste products located on the site." 71 Fed. Reg. at 33,631. Sediment is not included within this list, and EPA determined that the presence of sediment alone in a discharge from oil and gas construction activity is not indicative of contact with the statutorily specified materials. Id. EPA also determined that sediment is the pollutant most commonly associated with construction discharges, whether at oil and gas sites or at other construction sites. Id. Therefore, because sediment is the pollutant most commonly associated with construction discharges, and because construction sediment alone is not indicative

[2] Aside from the newly enacted definition, the term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" appears only in CWA section 402(*l*)(2). 33 U.S.C. § 1342(*l*)(2).

of contact with the materials specifically listed under CWA section 402(*l*)(2), EPA reasonably interpreted CWA sections 502(24) and 402(*l*)(2) not to require permits for storm water discharges containing only sediment from oil and gas construction activities. Id.

While the Phase I rule applied the NPDES permit requirement to storm water discharges from oil and gas exploration, production, processing, or treatment operations or transmission facilities that contributed to a water quality standards violation, EPA explained that because it had previously interpreted the section 402(*l*)(2) exemption as not applying to construction discharges at oil and gas sites, it had not needed to consider whether sediment alone fell under the exemption when it promulgated the Phase I Rule. Id. In its 2006 rule, EPA interpreted CWA section 402(*l*)(2), as amended by new section 502(24), to exempt from the permit requirement storm water discharges from construction activities at oil and gas sites containing sediment alone, even if they contribute to a water quality standard violation, because such discharges have not come in contact with the materials specified in CWA section 402(*l*)(2). Id.

III. Summary of the Panel's Decision

The panel majority (Senior Judge Roth (3d Cir.), sitting by designation, and Judge Thomas) issued an opinion in which it vacated the challenged rule. The majority found CWA section 402(*l*)(2) ambiguous under the analysis required by Chevron. The majority refused to afford any deference to EPA's construction of section 402(*l*)(2), based solely upon the majority's determination that EPA had changed its interpretation of the statute. In a strong dissent, Judge Callahan agreed that section 402(*l*)(2) is ambiguous, and argued that the rule should have been upheld as a reasonable interpretation of the ambiguous provision under Chevron step 2.

A. The Majority's Opinion

The majority recognized, consistent with the Court's previous decision regarding EPA's Phase I rule in NRDC v. EPA, 966 F.2d at 1307, that EPA has discretion to determine when a storm water discharge has been contaminated by contact with the statutorily specified materials under CWA section 402(*l*)(2). 526 F.3d at 595 & n.4. The majority determined that the case was squarely within step 2 of Chevron, finding it unclear from the plain language of the CWA, as informed by available legislative history, whether Congress intended to exempt from NPDES permitting requirements storm water discharges from oil and gas construction activities contaminated solely with sediment. Id. at 603-05. The majority stated that an agency is not estopped from changing a previous legal interpretation, but that a conflicting, subsequent interpretation is entitled to considerably less deference than a consistently held agency view. Id. at 605 (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993), INS v. Cardoza-Fonseca, 480 U.S. 421, 447 n.30 (1987)). However, the majority went on to invalidate EPA's rule solely because it determined that EPA had changed its interpretation, even while recognizing that EPA did so because Congress had effectively amended CWA section 402(*l*)(2) through the Energy Policy Act. 526 F.3d at 605-08. The majority specifically concluded that "EPA's inconsistent and conflicting position regarding the discharge of sediment-laden storm water from oil and gas construction sites causes its interpretation of amended section 402(*l*)(2), as reflected in the storm water discharge rule, 40 C.F.R. § 122.26, to be an arbitrary and capricious one." Id. at 608. Unlike the dissent, discussed below, the majority did not cite or discuss the Supreme Court's decision in Brand X, 545 U.S. at 981, where the Court held that an adequately explained change in agency policy is not invalidating, "since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency."

B. The Dissent

Judge Callahan agreed that the case was controlled by Chevron step 2. 526 F.3d at 608. She discussed the abundant case law holding that a change in agency position is not fatal under Chevron. Indeed, she quoted this Court's recent decision in Resident Councils of Washington, 500 F.3d at 1036, where the Court held that an agency's new position is entitled to deference as long as the agency adequately explains the reasons for the change. 526 F.3d at 609. Judge Callahan determined that EPA had provided such an explanation in this case: "[o]nce Congress included construction activities within the [section 402(*l*)(2)] exemption, EPA promulgated the rule at issue here based on what it perceived to be Congress's intent." Id. at 610. Judge Callahan also determined that EPA's previous views were not as rigid as cast by the majority because EPA had indicated in its Deferral Rule that it intended to further consider the effect of its regulation on the oil and gas industry and whether small oil and gas construction sites should be subject to regulation. Id. Thus, Judge Callahan concluded that EPA's interpretation was in flux at the time it promulgated the challenged rule and that EPA was guided by its understanding of Congress' intent in the Energy Policy Act. Id. Judge Callahan therefore concluded that EPA made a reasoned policy choice within its statutory authority, that EPA's interpretation is at least as plausible as competing ones, and the Court should therefore defer to it. Id. at 610-11.

STANDARD FOR *EN BANC* REVIEW

Rehearing *en banc* may be had where: "*en banc* consideration is necessary to secure or maintain uniformity of the court's decisions . . . ." Fed. R. App. P. 35(a)(1). Such review is warranted here because the Court's decision is directly contrary to Chevron and its progeny, including, among others, Brand X and this Court's decision in Resident Councils of Washington.

ARGUMENT

I. The Decision Is In Direct Conflict With Controlling Supreme Court And Ninth Circuit Precedent

The majority overturned EPA's regulation *solely because* it determined the regulation was inconsistent with EPA's previous treatment of discharges of sediment from oil and gas operations under CWA section 402(*l*)(2), notwithstanding EPA's explanation that it promulgated the challenged rule in order to implement Congress' intent in amending the CWA through the Energy Policy Act. This is directly contrary to Chevron and its progeny. Under Chevron, in reviewing an agency's construction of a statute it administers, the court must first decide "whether Congress has directly spoken to the precise question at issue." In such a case, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467

U.S. at 842-43. Next, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843 (footnotes omitted).

The majority conceded that the statutory provisions at issue are ambiguous. 526 F.3d at 605. The majority therefore should have deferred to EPA's interpretation as long as it was a permissible one. This is so regardless of whether EPA changed its interpretation, as long as EPA provided a reasonable explanation for the change. The Supreme Court made this abundantly clear in Brand X:

> [I]f the agency adequately explains the reasons for a reversal of policy, "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency". . . . "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis". . . . That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.

545 U.S. at 981-82 (citations omitted). See also Smiley v. Citibank, 517 U.S. at 742 ("Of course, the mere fact that an agency interpretation contradicts a prior agency position is not fatal"); Rust v. Sullivan, 500 U.S. at 186-87 ("This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the

statute in question"). This Court has likewise made clear that "an agency's 'new' position is entitled to deference 'so long as the agency acknowledges and explains the departure from its prior views.'" Resident Councils of Washington, 500 F.3d at 1036. Therefore, under the Supreme Court's and this Court's binding precedent, the Court should not have overturned the regulation merely because it determined EPA had changed its interpretation of CWA section 402(*l*)(2) with respect to sediment discharges. Rather, it should have determined whether EPA had adequately explained the basis for the change and whether the changed interpretation was a permissible one. The majority's opinion is therefore directly contrary to Chevron, Brand X, Smiley, Rust, and Resident Councils of Washington.

The majority also incorrectly concluded that EPA had focused upon storm water discharges of sediment alone from oil and gas operations when EPA promulgated its pre-existing regulations. EPA's regulations provide that an oil and gas operation is not required to obtain an NPDES permit for storm water discharges, unless, among other things, the discharge contributes to the violation of a water quality standard. 40 C.F.R. § 122.26(c)(1)(iii). While this would *technically* include a water quality standard violation due to sediment alone, there is nothing to suggest that EPA promulgated the Phase I regulation in order to specifically target discharges of sediment alone for regulation. In fact, the contrary is true. Indeed, the only statement from the preamble to EPA's pre-existing regulations quoted by the majority regarding sediment impacts from oil and gas operations is the following:

> [These] facilities are among those industrial sites that are *likely to discharge storm water runoff that is contaminated* by process wastes, toxic pollutants, hazardous substances, or oil and grease. *Such contamination can include disturbed soils* and process wastes containing heavy metals or suspended or dissolved solids, salts, surfactants, or solvents used or produced in oil and gas operations.

526 F.3d at 596 (quoting 55 Fed. Reg. at 48,029) (emphasis in majority opinion) (internal quotation marks omitted). Contrary to the majority's conclusion, EPA's use of the conjunctive "and" between "disturbed soils" and "process wastes" shows that EPA believed disturbed soils would be intermixed with the other materials discussed in the quoted language.

The majority also misinterpreted statements by counsel at oral argument as a concession that EPA had always been concerned with discharges of sediment alone from oil and gas operations. See 526 F.3d at 606. In response to direct questions from Judge Roth and Judge Thomas, counsel for EPA candidly acknowledged, that, *technically and hypothetically*, sediment discharges alone from oil and gas operations leading to a water quality standard violation would be covered under the regulation. Counsel also explained, among other things, that sediment from oil and gas operations would typically be mixed with the materials listed under CWA section 402(*l*)(2) (e.g., raw material, intermediate product, etc.), and that no one had pointed to a single instance where storm water discharges of sediment alone from an oil and gas operation had caused a water quality standard violation.[3]/ Without mentioning counsel's explanation, the majority recast the qualified acknowledgment of the technical and hypothetical reading of the regulation as constituting EPA's bedrock interpretation of CWA section 402(*l*)(2). See 526 F.3d at 607 (concluding that it was "EPA's long-standing position that discharges of storm water runoff from oil and gas activities, contaminated solely with sediment *and* which contribute to a violation of a water quality standard, require a NPDES permit") (emphasis in original). Thus the majority misinterpreted both EPA's previous regulatory statement and counsel's statements at oral argument to conclude that the regulation of storm water discharges from oil and gas operations containing sediment alone was a significant purpose of the initial regulations.

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[3]/ While there is no transcript of the oral argument, the audio of the argument is available on the Court's web page.

The majority also ignored EPA's explanation for why it interpreted the Energy Policy Act's amendment to the CWA to exclude from permitting storm water discharges from oil and gas construction activities contaminated solely with sediment. As discussed above, EPA explained that when it adopted the Phase I rule, it interpreted section 402(*l*)(2)'s exemption not to apply to storm water discharges from oil and gas construction activities. It also explained that because sediment is the pollutant most closely related to construction activities, EPA had not previously considered whether contamination due to sediment alone could indicate contact with the materials listed under CWA section 402(*l*)(2). The majority quoted passages from EPA's Phase I rulemaking with respect to construction sediment in general in order to conclude that "it can hardly be said . . . that EPA never considered how sediment alone should be treated prior to the Energy Policy Act of 2005." 526 F.3d at 607. This begs the question. EPA unquestionably considered how sediment alone should be treated under its Phase I and Phase II regulations, which clearly regulate sediment discharges from construction activity. The point is that EPA never specifically considered how sediment alone should be treated under the CWA section 402(*l*)(2) exemption until *after* Congress amended the CWA through the Energy Policy Act. As Judge Callahan recognized, "[o]nce Congress included construction activities within the exemption, EPA promulgated the rule at issue here based on what it perceived to be Congress's intent." Id. at 610. Thus, the majority never considered whether EPA's *actual* explanation for its perceived change in position was a reasonable one under Chevron, and it impermissibly vacated EPA's rule solely because it determined that EPA had changed its position. Indeed, because the majority found EPA's interpretation to be impermissible, contrary to Chevron and its progeny, the decision *imposes* the majority's *own* interpretation of the admittedly ambiguous CWA section 402(*l*)(2) and prevents EPA from implementing EPA's reasonable interpretation of Congress' intent in amending the CWA to add oil-and-gas-related construction activities to the list of exempted activities.

CONCLUSION

For the foregoing reasons, the Court should vacate the Panel's decision and rehear this case on the correct standard of review.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

I certify, pursuant to Circuit Rules 35-4 and 40-1, that the foregoing Petition for Rehearing, with a Suggestion for Rehearing *En Banc,* is proportionally spaced, uses 14-point type, and contains 4,199 words.

David A. Carson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I served a true and correct copies of EPA's Petition for Rehearing with a Suggestion for Rehearing *En Banc* upon the following counsel by first class United States mail:

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